88-1682

No. 88-_____

Supreme Court, U.S.
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In the

Supreme Court Of The United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
STATE OF HAWAII and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

On Writ of Certiorari to the Supreme Court of the State of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent
Kalama Land Company, Ltd.

No. 88-_____

In the

Supreme Court Of The United States

October Term, 1988

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

As the Court will discover when it compares the Petition For Writ Of Certiorari with the opinion of the Supreme Court of the State of Hawaii (set forth in the Appendix to the Petition, hereinafter cited as Petitioners' App.), the questions which Petitioners seek to present here do not pertain to the principal grounds upon which the Hawaii Supreme Court decided the case.

Respondent Kalama Land Company, Ltd. (hereinafter "Kalama") respectfully submits that the only questions properly before this Court are the following:

1. Whether Petitioners' failure timely to file their motion to vacate, modify or correct the arbitrator's award divested the state circuit court of jurisdiction, pursuant to the requirements of Hawaii Rev. Stat. §658-11?

2. Whether the Hawaii Supreme Court correctly found that no grounds existed to vacate, modify or correct the arbitrator's award, pursuant to the requirements of Hawaii Rev. Stat. §§658-9, 10?

TABLE OF CONTENTS

Questions Presented..... 1

Grounds for Jurisdiction..... 6

Statement of Case..... 7

Summary of Argument..... 7

Argument..... 8

I. Petitioners Failed Timely To File a Motion To Vacate, Modify Or Correct The Arbitration Awards Under Hawaii Revised Stat. § 658-11..... 8

II. Denial of This Writ Is Compelled By Public Policy In Favor Of Arbitration As An Efficient Alternative To Litigation.....13

Conclusion.....17

Appendix.....18

Order Denying Reconsideration (A-1)..18

Chapter 658, Hawaii Revised Statutes §658-8, §658-9, §658-10, §658-11 (A-2).....19

Notice of Appeal to Circuit Court (A-3).....22

TABLE OF AUTHORITIES

I. CASES — Page

Bacon v. Karlin, No. 11139, Slip op. [68 Hawaii _____, 727 P.2d 1127] (November 18, 1986)..... 12

Emporium Area Joint School Authority v. Anundson Construction and Building Supply Company, 402 Pa. 81, 166 A.2d 269 (1961)..... 16

Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2nd Cir. 1984)..... 9

Fortune, Alsweet & Eldridge v. Daniel, 724 F.2d 1355 (9th Cir. 1983)..... 10

Gadd v. Kelly, 66 Hawaii 431, 667 P.2d 251 (1983)..... 15

Mars Constructors, Inc. v. Tropical Enterprises Limited, 51 Hawaii 332, 460 P.2d 317 (1969)..... 15, 16

Peake v. First National Bank and Trust Company of Marquette, 717 F.2d 1016 (6th Cir. 1983)..... 10

Salud v. Financial Security Insurance Company, Ltd., No. 12178, Slip op. [745 P.2d 290] (November 10, 1987)..... 14

Schroud v. Van Argilis & Co., 34 Ill. Dec. 428, 398 N.E.2d 103 (Ill. App. 1979)..... 9

Sheetmetal Workers, Loc. 252 v. Standard Sheet Metal, 699 F.2d 481 (9th Cir. 1983)..... 10

Sutherland v. Fitzgerald, 291 F.2d 846 (10th Cir. 1961)..... 10

Page

Taylor v. Nelson, 788 F.2d 220
(4th Cir. 1986)..... 9

Territory of Hawaii v. Fasi, 40 Hawaii
478 (1954)..... 9

II. STATUTES

28 U.S.C. §2101(c)..... 6

Hawaii Revised Statutes
§ 658-11..... 9, 11, 15
§ 658-15..... 14

III. RULES

Federal Rules of Civil Procedure
Rule 59..... 10

Hawaii Rules of Appellate Procedure
Rule 4(a)(5)..... 12

Hawaii Rules of Civil Procedure
Rule 21..... 13
Rule 59..... 10
Rule 81(a)(5)..... 13

Rules of the Supreme Court
Rule 20.3..... 6

Grounds for Jurisdiction

Petitioners have failed to file this Petition within the jurisdictional time requirements. Sup. Ct. R. 20.3.

Petitioners seek review of an Opinion of the Hawaii Supreme Court which was entered on October 19, 1988. Pursuant to 28 U.S.C. §2101(c), Petitioners had within 90 days to file their Petition. The time for filing commenced to run, in this case, from the Order Denying Reconsideration. That Order was entered by the Hawaii Supreme Court on November 7, 1988. See Respondents' App., at 18.

The deadline for filing this Petition was February 6, 1989. Kalama was not served with the Petition until April 10, 1989.

Statement of Case

The alleged facts as stated in the Petition contain exaggerations and inaccuracies. Since those "facts" do not relate to the ground of the Hawaii Supreme Court decision, however, there is no good reason to go into detailed factual matters here.

Summary Of Argument

The decision of the Hawaii Supreme Court turned on Petitioners' failure to meet jurisdictional time requirements, in their appeal from the arbitrator's award. This ruling, only obliquely challenged by the Petition, was clearly correct.

Argument

I. Petitioners Failed Timely To File A Motion To Vacate, Modify Or Correct The Arbitration Awards Under Hawaii Rev. Stat. §658-11.

(A) Petitioners failed to comply with the ten-day limitation

The arbitration awards here at issue were rendered by Respondent Hawaii Housing Authority's ("HHA's") arbitrator-designee, Respondent Wendell H. Martin ("Martin"), on February 26, 1987. Petition for Writ, at page 4.

On March 10, 1987, Petitioners filed a "Notice of Appeal to Circuit Court." Kalama, however, was intentionally omitted as a party from this "appeal," and the "Notice" was never served on Kalama or Kalama's attorneys. See Notice of Appeal to Circuit Court (Respondent's App., at page 22) (containing no Certificate of Service). Kalama is the "adverse party" under Hawaii Rev. Stat. §658-11. Since no Motion under §658-11 was timely served, Petitioners cannot seek to vacate, modify or correct the

arbitration awards. Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2nd Cir. 1984); Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986).

Hawaii Rev. Stat. §658-11 requires that:

> [a] notice of a motion to vacate, modify, or correct an award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. (Emphasis added).

The ten-day time limitation on service of a motion to vacate, modify, or correct an award is not only clear and unambiguous, it is also mandatory. By using the word "shall," the Hawaii legislature expressed its unequivocal intent that the time deadline be strictly enforced. Cf., Territory of Hawaii v. Fasi, 40 Hawaii 478, 484 (1954) (the Court held that the word "'shall' is as mandatory as The Ten Commandments"). In Schroud v. Van Argilis & Co., 34 Ill. Dec. 428, 398 N.E.2d 103 (Ill. App. 1979), the Illinois court held that a lower court cannot extend the Illinois

90-day statutory period within which to move to vacate an arbitration award. The Ninth Circuit Court of Appeals, in Fortune, Alsweet & Eldridge v. Daniel, 724 F.2d 1355 (9th Cir. 1983), also held that the time limit on a motion to vacate an award is a statute of limitation and therefore an untimely motion must be denied. Accord, Sheetmetal Workers, Loc. 252 v. Standard Sheet Metal, 699 F.2d 481 (9th Cir. 1983).

Similar and analogous language under the provisions of Rule 59 of the Hawaii and the Federal Rules of Civil Procedure has been interpreted to preclude an untimely motion for new trial or to amend a judgment. In Sutherland v. Fitzgerald, 291 F.2d 846 (10th Cir. 1961), the court held that a motion purportedly brought under Rule 59 was ineffective where it was filed, but not served, within ten days of the underlying judgment. See also, Peake v. First National Bank and Trust Company of Marquette, 717 F.2d 1016, 1019, fn. 5 (6th Cir. 1983) (although

the parties at oral argument focused on the date of filing, the court stated that "the critical date is the date of service"). The policy considerations are stronger here than in situations under Rule 59, since arbitration is meant to be a quick and efficient alternative to litigation.

Since Petitioners' March 10, 1987 "Notice of Appeal" was not timely served, Petitioners were rightly precluded from seeking to vacate, modify, or correct the arbitration awards under Hawaii Rev. Stat. §658-11.

(B) Hawaii Rev. Stat. §658-11 does not permit an extension of time to move to vacate, modify, or correct an arbitration award.

Petitioners contend that the Honorable Richard Y. C. Au, trial judge, properly extended the time for filing the motion to vacate the awards. Petition for Writ, at page 20. The statute of limitations is jurisdictional, however, a court cannot

extend the time deadline for filing a motion to vacate, modify or correct an award. Cf. Bacon v. Karlin, No. 11139, slip op. [68 Hawaii ___, 727 P.2d 1127] (November 18, 1986). In Bacon, appellant filed an ex parte motion for extension of time to file notice of appeal, after the permissible time set forth in Hawaii R. App. Pro. 4(a)(5). The Circuit Court granted the motion and attempted to extend the time for filing the appeal. The Hawaii Supreme Court, however, ruled that the trial court had no power to extend the time for filing a notice of appeal, since such an extension was not authorized by Hawaii R. App. P. 4(a)(5). Bacon, 68 Hawaii at ___, slip op. at 4-5.

In the instant case, Chapter 658 does not permit an extension of time to serve a motion to vacate, modify or correct an arbitration award. The trial court's Order was therefore ineffective to resurrect Petitioners' attempt to overturn the arbitration awards.

II. Denial Of This Writ Is Compelled By Public Policy In Favor Of Arbitration As An Efficient Alternative To Litigation.

Petitioners' further arguments in support of their defective attempt to "appeal" the awards are misplaced. Petitioners claim that they attempted to follow Hawaii R. Civ. P. 21, which prevents "misjoinder" from being a grounds for dismissal. Petition for Writ, at page 20. The Hawaii Rules of Civil Procedure, however, are expressly inapplicable to proceedings to vacate, modify, correct, or confirm arbitration awards under Hawaii Rev. Stat. Chapter 658. See Hawaii R. Civ. P. 81(a)(5). Consequently, the lower court had no grounds to permit Petitioners to file their "Second Motion To Vacate, Modify, or Correct Arbitration Awards." Kalama's Motion to Confirm Arbitration Awards was therefore properly granted and the Opinion of the Hawaii Supreme Court was properly decided.

A denial of this Petition is entirely consistent with sound public policy in favor of arbitration. It is also consistent with the Hawaii Supreme Court's recent ruling in Salud v. Financial Security Insurance Company, Ltd., No. 12178, slip op. [745 P.2d 290] (November 10, 1987). In Salud, the Court dismissed an appeal on the grounds that an order denying a motion to vacate an arbitration award was not a "final and appealable" order under Hawaii Rev. Stat. §658-15. The Court stated that the appropriate procedure would be for the unsuccessful movant to move to confirm the award, perfect the appeal, and obtain appellate review of the order confirming the award.

The court also recognized, however, that "one who seeks to vacate an award, . . . must do so within ten days after the award is made and served." Salud, slip op. at 4, 745 P.2d at 292. Salud thus contemplates that a

proper motion to vacate, modify, or correct an arbitration award has been brought. Here, no such motion was timely served. If Petitioners could urge the vacation, modification, or correction of the arbitration award--without having brought a timely motion to vacate, modify, or correct--the provisions of Hawaii Rev. Stat. §658-11 would be rendered a nullity. A party wishing to contest an arbitration award could then simply wait until a Motion to Confirm is filed. A reading of the statute that thus eliminates Hawaii Rev. Stat. §658-11 would be illogical.

In Gadd v. Kelly, 66 Hawaii 431, 441, 667 P.2d 251, 258 (1983), the Hawaii Supreme Court emphasized that "[there is a] legislative policy to encourage arbitration and thereby discourage litigation, [therefore] judicial review of an arbitration award is confined to the 'strictest possible limits' . . . "; Mars Constructors, Inc. v. Tropical

Enterprises Limited, 51 Hawaii 332, 336, 460 P.2d 317, 319 (1969). As the Pennsylvania court stated in Emporium Area Joint School Authority v. Anundson Construction and Building Supply Company, 402 Pa. 81, 166 A.2d 269, 270 (1961), "arbitration should be a quick and easy mode of obtaining justice." (Emphasis in original). Granting relief from a failure strictly to comply with the provisions of Hawaii Rev. Stat. Chapter 658 would undermine this policy favoring arbitration and discouraging litigation.

Conclusion

The points which Petitioners request this Court to review are not dispositive of the case. For that reason--and particularly because the Petition does not and cannot challenge the clearly correct ruling of the Hawaii Supreme Court--the Petition for Writ of Certiorari should be denied.

Dated this 25th day of April, 1989.

ROSEMARY T. FAZIO

Attorney for KALAMA LAND COMPANY, LTD., Respondent

APPENDIX

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants-Appellants, vs. HAWAII HOUSING AUTHORITY (State of Hawaii) and its Designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees-Appellees.	CIVIL NO. 87-0799 MOTION FOR RECONSIDERATION

ORDER DENYING RECONSIDERATION

Upon consideration of Appellants' motion for reconsideration filed October 28, 1988 and the record,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii; November 7, 1988.

Donald A. Bremner, Dorothy G. Bremner, Kathleen M. Fischel and Corinne C. Strauser, appellants pro se on the motion

CHAPTER 658

HAWAII REVISED STATUTES

ARBITRATION AND AWARDS

§658-8 Award; confirming award. The award shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and delivered to one of the parties or the party's attorney. A copy of the award shall be served by the arbitrators on each of the other parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court specified in the agreement, or if none is specified, to the circuit court of the judicial circuit in which the arbitration was had, for an order confirming the award. Thereupon the court shall grant such an order, unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10. The record shall be filed with the motion as provided by section 658-13, and notice of the motion shall be served upon the adverse party, or the adverse party's attorney, as prescribed for service of notice of a motion in an action in the same court. [CC 1859, §932; RL 1925, §2931; am L 1925, c 276, pt of §1; RL 1945, §8708; am L 1949, c 347, §1; RL 1955, §188-8; HRS §658-8; am L 1972, c 90, §2(f); am imp L 1984, c 90, §1]

§658-9 Vacating award. In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or any of them;

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators. [CC 1859, §933; RL 1925, §2932; am L 1925, c 276, pt of §1; RL 1935, §4178; RL 1945, §8709; RL 1955, §188-9; HRS §658-9]

§658-10 Modifying or correcting award. In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties. [CC 1859, §934; am L 1911, c 115, §1; RL 1925, §2933; am L 1925, c 276, pt of §1; RL 1935, §4179; RL 1945, §8710; RL 1955, 188-10; HRS §658-10]

§658-11 Notice of motion to vacate, modify, or correct; stay. Notice of a motion to vacate, modify, or correct an award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. For the purposes of the motion any judge who might make an order to stay the enforcement of a judgment, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. The record shall be filed with the motion as provided by section 658-13. [CC 1859, §935; RL 1925, §2934; am L 1925, c 276, pt of §1; RL 1935, §4180; RL 1945, §8711; RL 1955, §188-11; HRS §658-11; am L 1972, c 90, §2(g); am imp L 1984, c 90, §1]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 NOTICE OF APPEAL TO CIRCUIT COURT: STATEMENT OF THE CASE: DESIGNATION OF RECORD ON APPEAL: ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL AND CORINNE C. STRAUSER, Appellants above named, pursuant to HRS Section 658-9 through 11, and Rule 72(a) of the Hawaii Rules of Civil Procedure, hereby appeal to the Circuit Court of the First Circuit from the decision of the HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee,

Arbitrator WENDELL H. MARTIN rendering a residential lease-rent arbitration award on February 26, 1987 which was received by the above named lessee Appellants on February 28, March 2 and February 28, 1987 respectively.

DATED: Honolulu, Hawaii, March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner, Appellant, lessee appearing for all named Appellants

/s/ Dorothy G. Bremner
Dorothy G. Bremner, Appellant lessee

/s/ Kathleen M. Fischel
Kathleen M. Fischel, Appellant lessee

/s/ Corinne C. Strauser
Corinne C. Strauser, Appellant lessee

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : STATEMENT OF THE CASE

STATEMENT OF THE CASE

1. The award is arbitrary because it does not reflect valid evidence presented by the lessees. The result reflects evident partiality in favor of the lessor.

2. The Arbitrator exceeded his power and/or executed it imperfectly so as to produce an award which is not a mutual, equitable, definite and final product.

3. There are evident miscalculations of figures involved in the amount of the award since the amounts do not reflect the full import of the evidence.

4. The Arbitrator failed to provide any findings of fact or conclusions to justify the award and to corroborate that it was derived in an objective rather than an arbitrary manner. Appellants requests to the HAWAII HOUSING AUTHORITY to have such findings produced have been refused.

5. The Arbitrator has awarded on a matter not submitted to him outside of his authority and upon which there was no evidence introduced at the hearing to justify his determination. In so doing the Arbitrator has arbitrarily abrogated the contractual arrangements existing between the lessees and their lessor, the Kalama Land Company in valid lease documents.

The Appellants pray that these errors will be remedied by the Court by vacating, modifying or correcting the above-referenced Arbitrator's award rendered on February 26, 1987 involving the Appellant lessees.

Dated: Honolulu, Hawaii; March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner,
Appellant, lessee
Appearing for all
Appellant, lessees

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 72(d)(1), Hawaii Rules of Civil Procedure, Appellants above-named designates as the Record on Appel the entire record, as established and kept by WENDELL H. MARTIN, Arbitrator and designee of THE HAWAII HOUSING AUTHORITY, during the duration of the

Arbitration proceeding January 5, 1987 to February 26, 1987.

DATED: Honolulu, Hawaii, March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner,
Appellant, lessee
Appearing for all the
Appellant, Lessees.

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

TO: RUSSELL FUKUMOTO
Executive Director of
Hawaii Housing Authority
1002 North School Street
Honolulu, Hawaii 96817

and its designee, Arbitrator
WENDELL H. MARTIN
c/o 1067 Alakea Street, 2nd Floor
Honolulu, Hawaii 96813

YOU ARE HEREBY ORDERED:

To certify and transmit to this Court, within twenty (20) days of the date stamped below, or within such further time as may be allowed by the Court, the entire record in this proceeding, defined in H.R.S. §658-13 in the matter of the Arbitration award dated February 26, 1987 for above-named Appellants.

DATED: Honolulu, Hawaii; March 10, 1987.

/s/ H. Seto (Seal)
Clerk of the Above-Entitled Court